SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

No. 206.

D'OENCH, DUHME & CO., INC., a Corporation,
Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORP., a Corporation,
Respondent.

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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1.

The Respondent, although admitting that the court below determined the place of contract by application of the Illinois law rather than the forum law of Missouri (Respondent's Brief page 6), attempts to excuse the error on the ground that it was "harmless" by contending that "the rule applied is in fact the same as that of the Missouri courts." The quoted contention, however, is purely a conclusion of the Respondent and is not in accord with the contention of the Petitioner which denies that the Missouri rule is the same. The Petitioner is entitled to the Court's, rather than Respondent's, opinion determining

the forum law. Respondent, in asserting that it does not understand that Petitioner claims the Missouri rule is different than the Illinois rule relied upon by the Court of Appeals, has apparently overlooked Petitioner's contention that it is well established in Missouri that a renewal of an accommodation note in no wise enlarges the rights of the parties when it is given without consideration and in no way changes the rights under the original note. In this case the original notes were executed in Missouri and made payable at the office of the maker in Missouri (R. 57-9). The Missouri rule is indisputable that all defenses that were available against the original accommodation note are available against renewal notes. **Massa v. Huehnerhoff, 59 S. W. (2d) 723 (Mo. A.); Farmers Bank v. Harris, 250 S. W. 946, 950 (Mo. A.); Davies County Bank v. Grantham, 13 S. W. (2d) 1079, 1081 (Mo. A.); Peoples Bank v. Yager, 221 Mo. A. 955, 288 S. W. 954; Ford v. Ford Roofing Co., 285 S. W. 538, 541 (Mo. A.).** This being true, Petitioner contends that the Missouri court in determining the place of contract would be governed by the terms of the original notes which clearly were subject to the defenses interposed by the Petitioner under the Missouri law, and would not enlarge Respondent's rights, because renewal notes were given without the slightest consideration therefor.

2.

With respect to the second question presented, Respondent argues that **Waggaman v. General Finance Co. of Philadelphia, Inc., 116 F. (2d) 254**, is not in conflict with the case at bar, for the reason that federal jurisdiction in the instant case was not invoked on the ground of diversity of citizenship.[1] Clearly, Respondent misconceives the

[1] That this affords no basis of distinction is clear from the decision in **Mishawaka Rubber & Woolen Mfg. Co. v. S. S. Kresge Co., 119 F. (2d) 316 (Advance Sheets)**, wherein the Circuit Court of Appeals of the Sixth Circuit applied the fundamental principle of the Erie case in a case where jurisdiction was not based on diversity of citizenship.

rule of the Erie case which formed the basis of the Waggaman decision. The rule in the Erie case requiring application of local law was not bottomed upon the premise of diversity of citizenship, but rather it rests upon the fundamental proposition that the federal courts are without authority from Congress (and, in fact, that Congress is without constitutional power to grant authority) to set up a "Federal general common law." Respondent (its Brief, page 2) and the Eighth Circuit Court of Appeals (R. 87) concede that the primary question for determination is whether the Illinois or Missouri law applies. This Court has clearly announced in Klaxon Co. v. Stentor Electric Mfg. Co., ... U. S. ..., 85 L. Ed. 969 (Advance Sheets), that the prohibition declared in the Erie case against independent determinations of the common law by the federal courts extends to the field of conflict of laws. It is a matter of substantive law as to whether a court will take judicial notice of the laws of foreign states,[2] and the federal courts, in determining a conflict of law question, must apply the common law of the forum state. It is the law in Missouri that absent pleading and proof of the foreign law, such law is presumed to be the same as the law of the forum.

The Erie case specifically rules that there is no "Federal general common law" with respect to matters of substantive law, and the Conformity Act clearly requires the district courts to follow the state law on procedural matters. The question here presented is one of substantive law (as it was so treated in the Waggaman case) and the

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2 Respondent seems to suggest that whether the foreign law must be pleaded and proved is a procedural rule. Respondent is mistaken, but if it were a procedural rule the same result would be reached, for then the matter would be governed by the Conformity Act, 28 U. S. C. A. 724 (see Lyon v. Mutual Benefit Health & Accident Assoc., 305 U. S. 484), which expressly provides "The practice, pleadings, and forms and modes of proceeding in civil causes * * * in the district courts shall conform" as nearly as practicable with that in the state courts of the forum. There is nothing in the New Federal Rules which would supersede the requirements of the Conformity Act on this subject.

decision in the case at bar applying as it did "general law" rather than Missouri law is squarely in conflict with that of the Circuit Court of Appeals for the Third Circuit in the Waggaman case.

The three cases to which Respondent refers as indicating that the rule in the Erie case "is probably not applicable in a suit to which the United States is a party" are clearly inapplicable and suggest a contrary inference. In each of those cases this Court specifically stated that federal statutes or treaties were involved, and that no local common law applied, thus indicating that had local common law been applicable, as in the case at bar, it would have been applied.[3]

In the case at bar the note sued on and all prior notes were given by a Missouri citizen to an Illinois state bank and, as it must be admitted by the Respondent, the rights of the parties are governed either under the law of Missouri or under the law of Illinois.

3.

Respondent's third argument is based upon the proposition that Respondent's statement of the Missouri rule is the law under the facts in this case. Respondent refers to

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[3] In **Board of Commissioners v. United States, 308 U. S. 343, 350, 352,** this Court clearly says:

> "Since the origin of the right to be enforced is the Treaty, plainly whatever rule we fashion is ultimately attributable to the Constitution, Treaties or Statutes of the United States, and does not owe its authority to the law making agencies of Kansas."

In **Royal Indemnity v. United States, ... U. S. ..., 85 L. ed. 888 (Advance Sheets),** this Court said:

> "The rule governing the interest to be recovered as damages * * * is not controlled by state statute or local common law."

In **Deitrick v. Greaney, 309 U. S. 190,** this Court said (l. c. 198):

> "The doctrine with which we are now concerned * * * is a principle which derives its force from the circumstances that respondent's act * * * is itself a violation of the statute * * *" (referring to the National Bank Act).

So there were no questions of local common law involved in those cases.

the note here sued on as a "negotiable instrument." The original notes were negotiable instruments and Missouri contracts, and Petitioner contends that the rights of the parties were governed by those notes under the Missouri law; the renewal note sued on shows on its face (R. 13) that it wasn't a negotiable instrument. Petitioner contends that it is entitled to a court determination as to whether it is against the public policy of Missouri to hold a citizen of Missouri liable on an accommodation note under the facts in this case, particularly so as there was a specific agreement not to sue, and that forbearance agreement constitutes a complete defense under the law of the forum. **Trautman v. Schroeder, 230 Mo. A. 985, 93 S. W. (2d) 303; Williams v. Kessler, 295 S. W. 482 (Mo. A.); Peoples Bank of Ava v. Rankin, 220 Mo. A. 205, 282 S. W. 91.**

4.

It is respectfully submitted that the writ of certiorari should issue.

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